COMMENTS

TAX EXEMPTIONS FOR EDUCATIONAL INSTITUTIONS: DISCRETION AND DISCRIMINATION

Among the many powers of the Internal Revenue Service (IRS) is the ability to exempt certain organizations from the burden of taxation. Although the Internal Revenue Code identifies general categories of exempt institutions, the Department of the Treasury has broad discretion to interpret statutory language with precise regulations that the IRS then applies in individual cases. This Comment examines one such regulation, as applied in a particular case, in an attempt to highlight the need for greater control of the executive bureaucrats' discretion.

In *Big Mama Rag, Inc. v. United States*,[1] the United States District Court for the District of Columbia upheld an IRS determination that a nonprofit publishing organization could be denied tax-exempt status on the ground that its newspaper failed to offer "a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[2] This Comment questions the practicality and constitutionality of a regulatory scheme that requires tax examiners to judge a publication's content. After presenting the facts of the case and the intricacies of the Treasury regulations, the Comment will focus on specific regulatory problems: how should the regulations be interpreted?; which tests apply to what organizations? Considerable unclarity and latitude for subjectivity are evident in the IRS scheme. The following sections deal with the constitutional limits on the IRS's power to withhold exemptions and conclude that first amendment and equal protection doctrines prohibit reliance on the reasoning approved in *Big Mama Rag*. More specifically, the broad language of the regulation and the conflicts between its various provisions create a serious possibility of unfair administration and chilling effect. The Comment concludes with a suggestion for salvaging the present regulations.

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[1] 79-1 U.S. Tax Cas. ¶ 9362 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[2] Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959). This standard is applied to groups that advocate a particular view but claim exemption as educational organizations. The "full and fair" standard is discussed at length below, *see* notes 64-73 *infra* & accompanying text.

I. The Case and the Treasury Regulations

In 1974, Big Mama Rag, Inc. (BMR, Inc.), a women's organization that publishes a feminist newspaper, applied for tax-exempt status as a charitable and educational institution.[3] Such applications are governed by section 501(c)(3) of the Internal Revenue Code, which grants exempt status to a variety of socially useful organizations, including the "charitable" and the "educational."[4] To qualify, an applicant organization must conform to Treasury regulations that define the activities and goals permissible for exempt institutions. In broad outline, the regulations allow exempt status to applicants whose articles of organization restrict their activities to furtherance of exempt purposes (the "organizational test"),[5] or whose activities are, in fact, primarily directed to accomplishment of exempt purposes (the "operational test").[6] An applicant fails to meet these tests if any part of its net earnings inures to the benefit of private persons.[7] The regulations also forbid exemption of " 'action' organizations," [8] those which "attempt to influence legis-

[3] Brief of Appellant at 8, Big Mama Rag, Inc. v. United States, No. 79-1826 (D.C. Cir., docketed Aug. 1, 1979) [hereinafter cited as Brief of Appellant]. Tax-exempt status is not valuable to Big Mama Rag, Inc. and similar nonprofit organizations because it allows them to escape income tax—they have little or no income. Rather, exempt status is desirable because it makes these organizations attractive to contributors. Under I.R.C. § 170(c)(2), charitable donations may be deducted from the donor's taxable income if, and only if, the donee is a tax-exempt institution. For further discussion, see text accompanying note 148 *infra*.

[4] I.R.C. § 501(c)(3). The section reads, in pertinent part:

> (c) List of Exempt Organizations.—The following organizations are referred to in subsection (a) [which grants exemption]:
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> . . . .
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> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or invidual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

For a general discussion of statutory administration, see Rainey & Henshaw, *Exempt Organizations: A Survey*, 19 S. Tex. L.J. 205 (1978).

[5] Treas. Reg. § 1.501(c)(3)-1(b) (1959).

[6] *Id.* § 1.501(c)(3)-1(c).

[7] I.R.C. § 501(c)(3). For complete text, see note 4 *supra*. *See* Treas. Reg. § 1.501(c)(3)-1(b)(2) (1959) (repeating statutory prohibition of private inurement).

[8] Treas. Reg. § 1.501(c)(3)-1(b)(3) (1959).

lation" [9] or "participate in, or intervene in . . . any political campaign on behalf of any candidate for public office." [10] The Treasury regulations go on to define some of the exempt purposes specified in section 501(c)(3), including "charitable" [11] and "educational." [12] The dangers inherent in these definitions form the subject matter of this Comment.

Big Mama Rag, Inc. v. United States [13] illustrates the definitional problems. Plaintiff is a nonprofit Colorado corporation with a feminist orientation.[14] The group offers a free library, lectures, workshops, and seminars on women's issues, but its primary activity is the publication of *Big Mama Rag*.[15] This monthly newspaper prints news reports, information, and editorials from an avowedly feminist point of view.[16] Most of the staff volunteer their services; [17] moreover, BMR, Inc. distributes free a large percentage of *Big Mama Rag*'s issues and severely restricts the amount of paid advertising.[18] Consequently, the organization neither makes nor expects to make a profit; [19] it is heavily dependent upon charitable contributions.[20]

The IRS District Director first denied BMR exempt status on the ground that the sale of some of its issues in the general market made the group's activities indistinguishable from ordinary commercial practices.[21] When the organization filed a protest, a hearing was held at the IRS national office. There, new reasons were given

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[9] I.R.C. § 501(c)(3). The regulations prohibit exemption if attempts to influence legislation form "a substantial part" of the organization's activities, Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959), or if the organization's main objectives can be attained only by passage or defeat of legislation and the organization "advocates or campaigns for" its objectives in partisan fashion, *id.* § 1.501(c)(3)-1(c)(3)(iv).

[10] I.R.C. § 501(c)(3). The regulations specify written and oral statements favoring or opposing a candidate as examples of participation or intervention. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1959).

[11] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

[12] Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

[13] 79-1 U.S. Tax Cas. ¶ 9362 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[14] *Id.* 86,869.

[15] *Id.*

[16] *Id.* "The editorial stance of the newspaper is that it will print anything that will advance the cause of the women's movement; it refuses to publish material it considers damaging to that cause. *Big Mama Rag*, Vol. 1, No. 3, at 2, Col. 2."

[17] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,870 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[18] *Id.*

[19] *Id.*

[20] Brief of Appellant, *supra* note 3, at 7.

[21] *See id.* 9 (quoting District Director's letter of Oct. 17, 1974).

for denial of exempt status: the commercial nature of the newspaper, its political and legislative commentary, and the articles and other materials "promoting lesbianism." [22] At the hearing, IRS officials offered the opinion that, according to an "unwritten policy" of the IRS, depiction of homosexuality as a valid sexual preference was impermissible for a tax-exempt organization.[23] After BMR, Inc. indicated that it would seek judicial review of the determination, the IRS issued a final determination letter, basing denial on yet another set of grounds: BMR, Inc.'s regular commercial practices and *Big Mama Rag*'s lack of educational content.[24]

BMR, Inc. secured judicial review in federal district court.[25] In a memorandum decision,[26] Judge John Sirica upheld the IRS determination. He first rejected the contention that plaintiff's publishing practices were indistinguishable from ordinary profitmaking ventures.[27] His decision rested solely on the definition of "educational": *Big Mama Rag* had "adopted a stance so doctrinaire it could not satisfy this standard." [28]

The specific standard that *Big Mama Rag* failed to meet is contained in Treasury regulation section 1.501(c)(3)-1(d)(3):

> (3) *Educational defined*— . . .
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> . . . .
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> . . . An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.[29]

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[22] *Id.* 9-10.

[23] *Id.* 10.

[24] *See* Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,870 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[25] *See* 26 U.S.C.A. § 7428 (Supp. 1979) (providing for declaratory judgment in federal district court for determination of tax-exempt status).

[26] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[27] *Id.* 86,870.

[28] *Id.* 86,872.

[29] Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959). Application of this test to organizations claiming educational exemption on the basis of published material is further governed by Rev. Rul. 67-4, 1967-1 C.B. 121, which lists the following criteria:

> (1) the content of the publication is educational, (2) the preparation of material follows methods generally accepted as "educational" in character,

BMR, Inc. argued that its activities could be judged not by the rigorous "full and fair" test, but under the more generous standard promulgated in Treasury regulation section 1.501(c)(3)-1(d)(2): [30]

> *Charitable defined.* The term "charitable" is used in . . . its generally accepted legal sense . . . . The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an "action" organization . . . .[31]

Although this section is entitled "Charitable defined," it appears appropriate for educational organizations because the enumerated charitable activities include "advancement of education." [32] Had the court chosen to apply the charitable standard rather than the specifically educational one, plaintiff would have escaped the need

(3) the distribution of the materials is necessary or valuable in achieving the organization's educational and scientific purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing practices.

These criteria were promulgated to govern exemption decisions based on scientific publications, but have since been extended to the field of education. *See* Rev. Rul. 77-4, 1977-1 C.B. 141.

Obviously, a publication must pass the first hurdle of "educational content" before an analysis of publishing practices is undertaken. Because the revenue ruling offers no new guidance on the meaning of "educational," this Comment will focus on the definition in Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

[30] *See* Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,871 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Declaratory Judgment at 11 [hereinafter cited as Plaintiff's Motion in district court].

BMR, Inc. also argued that *Big Mama Rag* fulfilled the requirements of the "full and fair" standard. *See* Plaintiff's Motion in district court, *supra* at 14.

[31] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) begins:

> (2) *Charitable defined.* The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

[32] *Id.*

to demonstrate that *Big Mama Rag* offered "full and fair exposition of the pertinent facts." An IRS examiner or a reviewing judge would only have inquired whether the organization was primarily concerned with advocating the election of particular political candidates or the passage or defeat of legislation.[33] Unlike the "full and fair" standard, the test for charitable exemption does not demand examination of the factual support for the idea advocated.

The trial judge declined to apply the more lenient standard.[34] Acknowledging the existence of "some semantic confusion," he nevertheless relied on precedent[35] and on the simple fact that separate definitions had been promulgated to hold the stringent test appropriate to organizations whose *only* claim to charitable exemption is their advancement of education.[36] In applying the "full and fair" standard to plaintiff, the court found that *Big Mama Rag*'s writers had not been "sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions." [37]

Big Mama Rag, Inc. also argued that the first amendment precluded the use of a content-based test for granting the prize of tax-exempt status. This contention was rejected on the ground that there is no "right" to tax exemption; it is a "privilege," which may be withheld on any rational, nondiscriminatory basis.[38] Judge Sirica also determined that the "full and fair" standard was sufficiently precise and value-free to withstand the charge of unconstitutional vagueness.[39]

The district court in *Big Mama Rag* had jurisdiction under a newly enacted declaratory judgment provision[40] adopted to provide

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[33] *See* notes 8-10 *supra* & accompanying text.

[34] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,872 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[35] *Id.* 86,871 n.5 (citing San Francisco Infant School v. Commissioner, 69 T.C. 957, 963-64 n.5 (1978)). The inappropriateness of this case is discussed in note 95 *infra*.

[36] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. at 86,871. The court also remarked that an applicant organization that is "charitable" on some ground other than "advancement of education" may benefit from the lenient standard. *Id.* 86,871 n.5.

In failing to consider whether BMR, Inc. fit into the charitable category on non-educational grounds, the court ignored plaintiff's argument that its goal could be defined as "'the promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination [or] defend human and civil rights secured by law.'" Plaintiff's Motion in district court, *supra* note 30, at 11 (quoting Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959)).

[37] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. at 86,872.

[38] *Id.* 86,873.

[39] *Id.*

[40] Tax Reform Act of 1976, § 1306(a), 26 U.S.C. § 7428 (Supp. 1979).

rapid judicial review of section 501(c)(3) exemption controversies.[41] In recommending adoption of this provision, the Senate Committee on Finance pointed to recent Supreme Court cases and to comments by a former Internal Revenue Commissioner, all disparaging in strong terms the absence of judicial control over IRS decisions.[42] *Big Mama Rag* ought to have been an example of the new regime of judicial control; the court could have offered analytical guidelines for future IRS determinations. Instead, Judge Sirica accepted—almost uncritically—the broad language of the Treasury regulation. His review of the parties' factual contentions rested entirely on one article in one issue of *Big Mama Rag*.[43] His only advice for future review of allegedly educational publications was that they must not be "doctrinaire." [44] As a result of this decision, the "full and fair" regulation remains a source of potential inequity.[45]

The next part of this Comment examines the weaknesses of the charitable/educational exemption regulation to show just how amenable to unauthorized policymaking the tax law can be.

II. Internal Defects of the Treasury Regulation

The regulation at issue in *Big Mama Rag* contains two forms of weakness. One stems from the broad language of the subsection "Education defined." The other is the presence of conflict between that subsection of the regulation and the one entitled "Charitable defined."

A. *The Problem of Vague Language and Subjective Interpretation*

(3) *Educational defined*—(i) *In general.* The term "educational", as used in section 501(c)(3), relates to—

[41] Senate Comm. on Finance, Tax Reform Act of 1976, S. Rep. No. 938, 94th Cong., 2d Sess. 586-87 (1976).

[42] *Id.* 586 & nn.4 & 5 (citing Alexander v. "Americans United" Inc., 416 U.S. 752, 774-75 (1974) (Blackmun, J., dissenting); Bob Jones Univ. v. Simon, 416 U.S. 725, 749-50 (1974) ("The degree of bureaucratic control . . . is susceptible to abuse."); Thrower, *IRS Is Considering Far Reaching Changes in Ruling on Exempt Status*, 34 J. Tax. 168 (1971) (expressing need for more case law to guide IRS)).

[43] *See* Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Case. ¶ 9362, at 86,871 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979) (discussing *Big Mama Rag* editorial refusing to publish material that "does not affirm our [feminist] struggle").

[44] *Id.* 86,872.

[45] Alexander v. "Americans United" Inc., 416 U.S. 752, 774-75 (1974) (Blackmun, J., dissenting). *See* text accompanying note 200 *infra*.

> *(a)* The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> *(b)* The instruction of the public on *subjects useful to the individual and beneficial to the community.*
>
> An organization may be educational even though it *advocates a particular position* or viewpoint so long as it presents a *sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.* On the other hand, an organization is not educational if its principal function is the mere presentation of *unsupported opinion.*[46]

The language italicized above instructs the tax examiner to make three difficult and highly subjective assessments of educational material: (1) its value ("useful and beneficial"); (2) its tenor ("advocates a particular position"); and (3) the quality of its argumentation ("full and fair" versus "unsupported opinion"). Each of these elements of the definition of "educational" leaves improper room for the influence of IRS agents' personal and political philosophies.

The wording in subsection (b), "instruction of the public on subjects useful to the individual and beneficial to the community," provides a singularly convenient excuse for denying exempt status to proponents of unpopular views. In the case of *Big Mama Rag,* for example, the government argued that "a newspaper dedicated to revolution and the destruction of societal institutions . . . can hardly be viewed as instructing the public on subjects useful to the community."[47] Judge Sirica did note that if this judgment had been the sole ground for the IRS decision, reversal would have been

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[46] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959) (emphasis supplied).

[47] Defendants' Cross Motion for Summary Judgment at 10, Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979). The brief quotes a lengthy editorial in which the editors of *Big Mama Rag* explain their policies:

> (1) We define ourselves as radical feminists. By "radical" we mean that we are committed to the complete eradication of the present social system, and the institution of another which will speak to the needs of all people and which will not benefit any person or class of people at the expense of any other person or class of people.

Id. 9 (quoting Big Mama Rag, Sept., 1976, at 4, col. 2). Judged on the basis of this editorial, the government's characterization of *Big Mama Rag* as revolutionary appears accurate. The characterization of this policy as not "beneficial to the community" ignores, however, BMR, Inc.'s express intention to create an egalitarian society and highlights both the importance and the subjectivity of the IRS judgment required by the Treasury regulation.

required due to the standard's subjectivity.[48] Because he accepted the IRS's alternative grounds, however, the denial and the regulation were allowed to stand.[49]

The continued existence of this part of the regulation does not become harmless even if Judge Sirica's treatment of it is approved by other courts. The "beneficial to the community" standard lends itself to such "unwritten policies" as the disapproval of proselytizing homosexuality evinced by IRS officials at the *Big Mama Rag* hearing.[50] Although a *denial* of exempt status avowedly based on this language could be struck down, the *grant* of an exemption based on an "unwritten policy" along those lines might still be upheld.[51]

In this regard, it is instructive to compare the treatment of *Big Mama Rag* with the treatment of an organization that did clear the "beneficial to the community" hurdle. Educational exemption was granted to a group that gave counseling on unwanted pregnancies and provided information about lawful abortion, as well as other options.[52] Certainly the benefit to the community of such counseling would be denied by many. Yet the IRS approved this organization's application without analysis of the social bane or boon of the education offered. By supplying federal support in the form of a tax benefit, the Internal Revenue Service engages in social engineering as surely as it does by denying that benefit.[53]

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[48] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,872 n.6 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[49] *Id.* Under current Supreme Court doctrine, Judge Sirica was probably correct in his unstated assumption that a constitutionally acceptable reason for denial of the exemption justified the denial even if unconstitutional considerations were also present. *See* Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (school board may justify firing teacher by showing that it would have taken the same action absent disagreement with his publicly aired views); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (dictum) (village may justify racially discriminatory decision if it shows that the same decision would result absent "impermissible purpose").

[50] *See* text accompanying note 23 *supra*. It should be noted that the IRS has not proved wholly intolerant of homosexuals. *See* Rev. Rul. 78-305, 1978-2 C.B. 172 (exempt status granted group dedicated to educating the public about homosexuality).

[51] Indeed, it would be a rare case that would come before a court at all because the exempt institution is most unlikely to challenge the favorable IRS ruling. Occasionally, however, third parties have been granted standing to challenge tax exemptions. *See, e.g.*, Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971) (parents of children excluded by racially discriminatory school policy may challenge exempt status of school).

[52] Rev. Rul. 67-216, 1967-2 C.B. 180.

[53] The "beneficial to the community" language gives the tax examiner discretion not only in evaluating worth, but also in defining the relevant community. Educational exemption was granted, for example, to an organization "formed to develop safety standards . . . for the . . . operation of yachts and other small craft." Rev.

Further latitude for subjective evaluation is afforded by the proviso requiring special scrutiny of advocacy. Only an organization that "*advocates* a particular position or viewpoint" must present a "full and fair exposition of the pertinent facts";[54] the merely "educational" group need not run the "full and fair" gauntlet. Where is the line between education and advocacy? Are only those who teach extreme views "advocates," or should the term include also those who argue noncontroversial positions? The latter course offers the best assurance of administrative fairness. The IRS, however, has chosen the former line. The Treasury Department's *Exempt Organizations Handbook*,[55] in attempting to elucidate the exemption guidelines, adopts the term "controversial" as a synonym for "advocates a particular position": "Organizations doing research or educating the public on controversial public issues must stick to the reasoned approach and avoid unsupported opinion."[56]

Revenue rulings on the issue are relatively sparse. A survey of section 501(c)(3) rulings of the past fifteen years reveals that few organizations have been deemed advocates. To the contrary, several rulings involve cases of organizations that clearly sought to advance particular social views, but were not even considered candidates for the "full and fair" test under the advocacy proviso. Examples include an organization "formed to educate the public on the need for international cooperation,"[57] an organization that "extensively publicized" a "proposed code for fair campaign practices,"[58] and several groups with the goal of eliminating discrimination.[59] These organizations may be contrasted with others that

Rul. 68-164, 1968-2 C.B. 252. Revenue rulings like this one indicate that organizations may obtain exempt status although their educational offerings appeal only to small communities. The difference, of course, between the boating group and BMR, Inc. is that the former is politically innocuous, the latter decidedly not. It seems likely that the beneficiaries of a radical organization's activities would have greater difficulty qualifying as an appropriate "community."

[54] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959) (emphasis supplied). For the full text of this section, see text accompanying note 46 *supra*.

[55] 3 INT. REV. MANUAL-ADMIN. (CCH) pt. 7751.

[56] *Id.* § 345.(12), at 20,572 (Apr. 28, 1977). This section of the handbook combines discussion of action organizations and of advocacy. The first involves determination of whether the applicant organization advocates legislative action or participates in specific political campaigns; the second, determination of the existence of advocacy in organizations that do not fall within the "action" prohibition. The sentence quoted in the text comes from the latter discussion.

[57] Rev. Rul. 67-342, 1967-2 C.B. 187.

[58] Rev. Rul. 76-456, 1976-2 C.B. 151. Analysis in this ruling was limited to a determination that the organization did not run afoul of the prohibition on action organizations, *see* notes 8-10 *supra* & accompanying text, by intervening in political campaigns.

[59] *See* Rev. Rul. 75-285, 1975-2 C.B. 203 (exemption of group that educated minorities on legal rights and assisted in enforcement proceedings); Rev. Rul.

were held to the advocacy standard. In the latter category were an organization that sought to educate the public on homosexuality,[60] a group dedicated to "alert the American citizenry to the dangers of an extreme political doctrine," [61] and various nonprofit umbrella organizations that provided forums for opinion on "controversial" issues.[62]

The real difference between the two sets of groups was not the advocacy *vel non* of their particular viewpoints, but the nature of those views. The rule seems to be that if the opinion is "innocuous" or in keeping with prevailing mores, then it is education and not advocacy; if the view is controversial, then the advocacy proviso and the higher level of content scrutiny apply.

This evidence does not suggest that exempt status will be denied for all controversial points of view.[63] It does indicate, however, that an organization whose views are nonmajoritarian is more likely to be cast as an "advocate" and required to negotiate the stumbling block of the "full and fair" standard. Because no definition of advocacy is value-free, the decision to apply the strict standard may rest upon a subjective evaluation of an organization's public stance. As was the case with the "useful and beneficial" clause, the advocacy proviso permits a tax examiner to follow his own—or the majority's—social philosophy in reviewing applications for tax-exempt status.

72-228, 1972-1 C.B. 148, 149 (exemption of organization that aided women in "recognizing and dealing with discrimination"); Rev. Rul. 68-70, 1968-1 C.B. 248 (exemption of group seeking to eliminate employment discrimination); Rev. Rul. 67-250, 1967-2 C.B. 182 (exemption of organization that urged public to respond to need for nondiscriminatory housing). These groups were also eligible for exempt status as charitable organizations seeking "to eliminate prejudice and discrimination." Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). The rulings cited above are notable, however, for having found an independent educational basis for exemption.

[60] Rev. Rul. 78-305, 1978-2 C.B. 172 (exemption granted). Although the ruling notes that the organization does not "advocate" becoming homosexual, *id.* 173, the careful analysis of sources and documentation in the material distributed to the public by the organization indicates that the "full and fair" standard was applied.

[61] Rev. Rul. 68-263, 1968-1 C.B. 256 (denied exemption for not offering full support of charges leveled against named individuals).

[62] *See* 3 INT. REV. MANUAL-ADMIN. (CCH) pt. 7751, § 345.(12), at 20,573 (Apr. 28, 1977) (citing Rev. Rul. 66-256, 1966-2 C.B. 210). *See also* Rev. Rul. 79-26, 1979-1 C.B. 196 (group formed to educate public on right of access to media and to evaluate local broadcasters); Rev. Rul. 76-443, 1976-2 C.B. 149 (educational television programming organization); Rev. Rul. 71-395, 1971-2 C.B. 228 (group that provided classes of interest to the community, including "controversial" courses). All of these organizations were held to have fulfilled the "full and fair exposition" requirement and were granted exempt status.

[63] The homosexual and media programming groups were declared tax-exempt. *See* notes 60 & 62 *supra* & accompanying text.

A different source of ill-informed and subjective rulings lies in the requirement of "a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." [64] This standard has been interpreted as an instruction to prefer organizations that adopt certain modes of argumentation: research or scholarly inquiry, including surveys and opinion polls; [65] objective factual analysis rather than appeals to emotion; and avoidance of disparaging terms or inflammatory language.[66] Thus, the test governs the form and content of an advocacy organization's public expression.

The essential failing of the test as interpreted is its narrowness—the criteria listed above are inappropriate for many topics and inadequate as definitions of education. The enumerated factors may serve to define the boundaries of a scholarly research project. The American Sociological Association, for example, might properly use these factors to determine which articles it will publish. Sociological methods of "truthfinding" should not, however, be regarded as synonymous with "education." [67] Both in law and in common parlance, education has been a concept broad enough to encompass strong language and emotional appeals. Even so formidably prosaic an authority as *Black's Law Dictionary* states that "[e]ducation may be particularly directed to either the mental,

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[64] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959). For full text, see text accompanying note 46 *supra*.

[65] *See, e.g.*, Rev. Rul. 78-305, 1978-2 C.B. 172 (approving organization whose statements were prepared and supported "through the use of opinion polls and independently compiled statistical data from research groups and clinical organizations").

[66] *See* Defendants' Cross Motion for Summary Judgment at 7, Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979):

> Factors which should be considered relevant in making a determination as to educational content are: the degree to which the organization's viewpoint is supported by a relevant factual basis; the extent to which the publication makes use of inflammatory and disparaging terms which express conclusions based more on strong emotional feelings than objective factual evaluations; whether the organization resorts to innuendo and inference rather than forthright statement of the proposition being advanced; and whether the organization places primary emphasis on the dissemination of information rather than research or scholarly inquiry into the subject matter with which it is concerned. *See* Rev. Rul. 68-263, 1968-1 C.B. 256.

[67] That statistics are easily manipulated highlights the difficulty of equating them with "education." A poorly designed questionnaire, for example, can skew data to obscure the true result of an opinion poll. *See generally* D. HUFF, HOW TO LIE WITH STATISTICS (1954); H. LOETHER & D. MCTAVISH, DESCRIPTIVE STATISTICS FOR SOCIOLOGISTS ch. 3 (1974).

moral, or physical powers and faculties, but in its broadest and best sense it relates to them all." [68]

The judicial view is similar. As one court has stated, " '[e]ducation' is an extremely broad concept, and Congress has not specifically defined its meaning in a tax sense. We note that the judiciary will liberally construe, and rightfully so, provisions giving tax exemptions for charitable, religious, and educational purposes." [69] In another context, the Supreme Court, recognizing the communicative value of powerful speech, held that a word's emotional impact is as important an element of its message as objective denotation.[70] Yet the IRS conception of educational merit restricts exempt communications to dispassionate, academic discourse. So dry an approach misconceives the nature of education. A scholar's appeal to reason may educate, but so may the advocate's appeal to emotion or intuition.[71]

The subjectivity of this element of the Treasury regulation's test appears when it is applied to organizations like BMR, Inc. *Big Mama Rag* is a self-styled radical feminist publication whose editorials and commentary often employ highly charged rhetoric.[72] An Internal Revenue agent may well be ill-qualified to judge the ability of the average reader of *Big Mama Rag* to "form an independent opinion or conclusion" based on its articles. It is probably safe to assume that many IRS officials—and even federal judges—are not well versed in radical feminist ideology or comparably controversial views. An examining official untutored in the niceties of radical dialectic may easily regard its exponents as unremittingly "doctrinaire," whereas a receptive reader would find reasoned debate.[73] Here again, as with the other two important elements of

[68] BLACK'S LAW DICTIONARY 461 (5th ed. 1979) (definition of "education").

[69] American Inst. for Econ. Research v. United States, 302 F.2d 934, 937 (Ct. Cl. 1962) (sustaining denial of exemption when organization's commercial pursuit was substantial).

[70] *See* Cohen v. California, 403 U.S. 15, 26 (1971).

[71] By itself, such a broad concept might include nearly every form of expression. Advertising could be called educational, as could "hate literature." It need not follow, however, that all organizations whose publications are arguably educational should hold tax-exempt status. Exemption is conditioned on other requirements that this Comment does not question. The Treasury regulation restricts the extent and form of commercial activities in which an exempt organization may engage and prohibits private inurement and specific political activities. *See* text accompanying notes 4-10 *supra*. An advertising or trade publication that claimed to be educational would have to pass the noncommercial-activities test, which, given the natural purpose of advertising, is unlikely.

[72] *See* note 16 *supra*.

[73] Such insensitivity appears in the government's assessment of *Big Mama Rag*'s content. As evidence of the publication's insistent promotion of "its own unalloyed point of view," defendants' appellate brief cites, among other examples, a reader's

the Treasury regulation's definition of "educational," a majoritarian mentality may condition the distribution of the tax benefit.

B. *The Problem of Conflicting Subsections*

The second major flaw in the Treasury regulation has already been mentioned; it arises from the competition between the subsections entitled "Charitable defined" and "Educational defined." [74] Both appear applicable to educational organizations because the definition of charitable includes "advancement of education." [75] The choice of definition, however, is more than an administrative formality. Advocacy organizations denominated "charitable" need not conform to the "full and fair" standard, while those labeled "educational" must pass that test.[76] For BMR, Inc., Judge Sirica's selection of the educational standard resulted in denial of exempt status; it probably would have qualified had the definition of "charitable" governed the decision.[77] The following discussion attempts

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letter that "attempts to explain some subtle distinctions between the philosophies of two spokespersons for the 'revolutionary struggle.'" Brief for Appellees at 14 & n.7, Big Mama Rag, Inc. v. United States, No. 79-1826 (D.C. Cir., docketed Aug. 1, 1979). Thus, one man's dogma may be another person's debate. This episode is not offered as proof that BMR, Inc. should pass the "full and fair" test, but it does illustrate the extreme subjectivity of the judgment called for under the Treasury regulation.

Profitable comparison may be made to an observation on the dynamics of prior restraint:

> Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration. One factor is the ability and personality of the licenser or censor. As Milton long ago observed,
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> "If he be of such worth as behoves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books or pamphlets . . . ."
>
> . . . The function of the censor is to censor. . . . He is often acutely responsive to interests which demand suppression—interests which he himself represents—and not so well attuned to the more scattered and less aggressive forces which support free expression.

Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 658-59 (1955) (footnotes omitted).

[74] *See* notes 29-33 *supra* & accompanying text.

[75] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

[76] *Id.* ("charitable" organizations' public expression limited only by requirement that they refrain from specified political activities that would render them nonexempt "action" organizations).

[77] Judge Sirica's opinion rested solely on the plaintiff's failure to conform to the "full and fair" standard. *See* text accompanying notes 27-28 *supra*. Because the defendants did not allege that BMR, Inc. was an action organization, there would have been no impediment to the grant of exempt status under the charitable standard.

to show that the distinction between charitable and educational organizations is unjustified and, under the present regulatory scheme, incapable of neutral administration.

There is little evidence of a systematic legislative policy behind section 501(c)(3)'s list of exempt organizations.[78] Changes and additions to the list have been largely ad hoc, reflecting changing fashions in charity or particular political events.[79] Although the statute recites "educational" and "charitable" separately,[80] the legislative history of the Internal Revenue Code affords no basis for disparate treatment of these categories—the problem is simply not discussed.[81] Commentators have suggested that the statutory distinction is "an unnecessary bit of specification." [82]

This lack of coherent legislative policy may explain the Treasury regulation's schizophrenia. For while the regulation distinguishes charity and education for definitional purposes, its substantive discussion of charity leads rather to the conclusion that "charitable" must subsume "educational."

Not only is advancement of education listed in the regulation as one example of a charitable activity, but also the regulation remarks that "charitable is used in its generally accepted legal sense." [83] In order to understand the impact of that comment, one must look to the law of trusts, where legal treatment of charities has been most comprehensive.[84] Under the common law, trusts for "the advancement of education" [85] and the "dissemination of

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[78] *See* B. HOPKINS, THE LAW OF TAX EXEMPT ORGANIZATIONS 3 (3d ed. 1979); Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301-04 & 334 (1976) (noting that rationales for charitable and educational exemptions are essentially the same). *See generally* Trenerry, *A Literary Pilgrim's Progress Along Section 501(c)(3)*, 51 A.B.A.J. 252 (1965).

[79] Recent provisions delineating the extent of political parties' exemption possibilities, *e.g.*, I.R.C. § 527 (1975), are thought to have been stimulated by the Watergate scandal. *See* Bittker & Rahdert, *supra* note 78, at 328.

[80] I.R.C. § 501(c)(3), *quoted in* note 4 *supra*.

[81] *See, e.g.*, HOUSE WAYS & MEANS COMM., INTERNAL REVENUE CODE OF 1954, H.R. REP. No. 1337, 83d CONG., 2d Sess. 51, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4017, 4077 (no explanation of particular exemptions); 50 CONG. REC. 1306 (1913) (remarks of Rep. Hill) (suggests that enumeration of kinds of exempt institutions is insignificant because only nonprofit character is relevant to tax-exemption purpose).

[82] Bittker & Rahdert, *supra* note 78, at 333.

[83] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). The continued relevance of this view is indicated by a 1976 Revenue ruling holding that "[t]he term educational is used in section 501(c)(3) of the Code in its general legal sense in the law of charities and does not have a separate and distinct meaning from the term Charitable." Rev. Rul. 76-366, 1976-2 C.B. 144, 144.

[84] *See* A. SCOTT, 4 THE LAW OF TRUSTS §§ 348-377 (3d ed. 1967).

[85] *Id.* § 370, at 2866.

knowledge or beliefs through the publication or distribution of books or pamphlets" have long been held charitable.[86]

Generous reading of the law of charitable trusts has been the norm.[87] Trusts providing for dissemination of unpopular minorities' views are therefore upheld.[88] Moreover, the New Jersey Supreme Court confirmed as a charitable trust a bequest for the publication and advancement of the testator's scientific ideas, ideas which the lower court had found " 'irrational, unintelligible and of no scientific or other value.' " [89] The supreme court nevertheless held that "[e]ven where the opinion sought to be propagated is 'foolish or . . . devoid of foundation,' the bequest is not necessarily void as a charitable use." [90] This broad-minded attitude is by no means foreign to the Internal Revenue Service. In one instance, it conceded that "the promotion of social changes or objectives by educational means is 'charitable.' " [91]

Against such a background of trust and tax law a rigid distinction between education and charity seems quite unjustified. When the effect is to exclude an organization from exemption solely on the ground that it fails to meet the definition of "educational," the distinction flies in the face of the regulation's injunction that "charity" "is not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions." [92]

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[86] *Id.* 2871.

[87] The only content-related judgment conditioning the designation of a charitable trust was very similar to the "useful and beneficial" standard contained in Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) and regarded as too subjective by Judge Sirica, Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,872 n.6 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979). In the context of charitable trusts, this standard has been very narrowly defined to prohibit designation as charitable only of trusts for the propagation of illegal or dangerous ideas. *See* A. SCOTT, *supra* note 84, at § 370, at 2871. One court has held that the judgment whether an idea is beneficial to the community is to be made by the grantor of the trust and not by the court. *See* Wilber v. Owens, 2 N.J. 167, 176, 65 A.2d 843, 847 (1949).

[88] *See, e.g.,* Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932) (propagation of socialist philosophy is educational for purposes of establishing charitable trust); Estate of Connolly, 48 Cal. App. 3d 129, 121 Cal. Rptr. 325 (1975) (bequest to agnostic group held charitable because educational); A. SCOTT, *supra* note 84, at § 370, at 2875 (citing cases).

[89] Wilber v. Owens, 2 N.J. 167, 171, 65 A.2d 843, 844 (1949) (quoting Wilber v. Asbury Park Nat'l Bank & Trust Co., 142 N.J. Eq. 99, 111, 59 A.2d 570, 578 (1948)).

[90] *Id.* at 176, 65 A.2d at 847 (citation omitted).

[91] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 874 n.21 (D.D.C. 1973).

[92] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

Despite the custom—historical and contemporary—of regarding "educational" as a subset of "charitable," the Treasury regulations do, in fact, supply different exemption standards. Leaving aside the problem of justifying the distinction, the regulation is open to criticism for failure to indicate when either test is applicable. In *Big Mama Rag,* Judge Sirica suggested a rule of choice: the educational test should be used when educational endeavors are the *only* basis for exemption; when the applicant organization also pursues some other charitable goal, then the charitable standard is appropriate.[93] This rule, though plausible, bears no relation to IRS practice as revealed in cases and revenue rulings, which generally observe, without analysis, that an exemption should be granted on "charitable and educational" grounds.[94] The rule is not even supported by the case cited as its source.[95] Nor did the district court follow its own rule, for it ignored BMR, Inc.'s claim to charitable exemption as an organization promoting social welfare and equality.[96] Absent a rule originating in the regulation or in established practice, a reviewing official's discretion is the only guideline for the choice of standard.

In summary, each important element of the Treasury regulation's definition of "educational," as well as the decision whether to apply that definition or the more lenient definition of "char-

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[93] *See* Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,871 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[94] *See, e.g.,* Rev. Rul. 75-285, 1975-2 C.B. 203 (education on minority rights); Rev. Rul. 72-228, 1972-1 C.B. 148 (promotion of women's rights); Rev. Rul. 68-438, 1968-2 C.B. 209 (lessening of racial and religious tensions). One treatise has noted this frequent failure to consider whether an organization independently satisfies the "educational" or "charitable" standard. P. TREUSCH & N. SUGARMAN, TAX EXEMPT CHARITABLE ORGANIZATIONS 82-83 (1979).

[95] *See* Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,871 & n.5 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979). Judge Sirica's reliance on San Francisco Infant School, Inc. v. Commissioner, 69 T.C. 957, 963-64 n.5 (1978), is misleading and misplaced. The issue in the *Infant School* case was whether the plaintiff day care center met the *operational* test for a § 501(c)(3) organization. *See* text accompanying note 6 *supra.* The footnote cited by Judge Sirica supports the argument that a charitable/educational and an educational/educational organization (assuming there is a meaningful distinction) must meet the same activities requirements for the operational test. That is, the same percentage of activities must be devoted to education. This ruling is reasonable because only *one* operational test is enunciated in the regulations—in § 1.501(c)(3)-1(c). Two standards, however, govern permissible advocacy, one applicable to educational organizations and the other to charitable groups. The *Infant School* opinion did not address this issue at all. Judge Sirica's attempt to transfer that case's treatment of the operational test to the conflicting standards of advocacy glosses over the problem of choosing between the two.

[96] *See* note 36 *supra.*

itable," contains vast loopholes for the play of individual discretion. And personal discretion is a peculiarly disturbing standard of review. The potential for unfair treatment has already been discussed.[97] That potential is far from speculative, for instances of abuse of the exemption process are documented.[98] A personal discretion standard is particularly troublesome when discretion is given to bureaucrats, whose expertise is financial, to determine the nature and value of an educational endeavor.[99] These officials may not take the time to consider variety and innovation in education, innovation which might be acceptable to those truly dedicated to and knowledgeable about the educative process. Far from avoiding the danger of tax-subsidized social controversy, the regulation thus permits IRS agents to influence that controversy by making personal choices among social philosophies.[100] If we genuinely value wide-ranging, robust public debate,[101] we should be wary of a governmental process that lends itself to intellectual and ideological leveling.

III. Constitutional Challenges to the Educational Standard

The previous parts of this Comment outlined the internal defects of Treasury regulation 1.501(c)(3)—defects which revealed a degree of vagueness and a potential for discriminatory application that go beyond maladjusted bureaucracy. The next part of this Comment argues that these defects render the regulation a mechanism for control of expression that violates the first amendment and the equal protection component of the fifth amendment's due process clause.

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[97] *See* notes 47, 50-53, 55-56, & 72-73 *supra* & accompanying text.

[98] *See* note 145 *infra.*

[99] Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 Harv. L. Rev. 705, 729 (1970). Surrey notes that parallel problems exist at the budgetary and legislative levels. Tax incentives for education, for example, are handled by congressional finance committees, and not by the committee that would ordinarily handle programs operated by the Department of Education. For further discussion, see Kirkwood & Mundel, *The Role of Tax Policy in Federal Support for Higher Education,* Law & Contemp. Probs., Autumn, 1975, at 117.

[100] "Nothing is more certain than death and taxes except man's desire to avoid both. Nothing is more uncertain than a prediction of a field agent's interpretation of the Internal Revenue Code." Jordan, *Trends in Tax Exemption,* in Trends in Nonprofit Organizations Law 11, 12 (collected papers from Wake Forest University Seminar; H. Oleck chairman 1977).

[101] *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

A. *The Constitutional Status of Tax Benefits*

1. "Rights," "Privileges," and Constitutional Challenges

Does denial of tax-exempt status infringe free expression so directly and severely as to evoke strict judicial scrutiny? The district court in *Big Mama Rag* disposed of the plaintiff's first amendment claim by classing tax-exempt status a "matter of legislative grace," [102] which could be invalidated only if "the purpose or effect of the refusal [of exempt status] is . . . to discriminate against those with controversial views or beliefs." [103] The court concluded that plaintiff had not shown that the regulation was invalid on its face or that the IRS used the educational standard to discriminate against disfavored organizations.[104] Examination of this holding will reveal that it is too narrow a view of first amendment rights in general and inappropriate to exemption questions in particular.

Underlying Judge Sirica's analysis and similar tax-exemption determinations [105] is the assumption that first amendment problems arise only when governmental actions deny or penalize a "right" as opposed to a "privilege." This dichotomy is both outmoded and unrealistic.[106] A large body of case law recognizes that conditions imposed upon the distribution of governmental largesse—a "privilege"—may entail unacceptable danger to protected rights.[107] These cases do not require evidence of actual discrimination before the constitutional inquiry takes place; they look instead for the

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[102] Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,872 (D.D.C. Apr. 30, 1979), *appeal docketed,* No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[103] *Id.*

[104] *Id.* 86,873.

[105] *See* Cammarano v. United States, 358 U.S. 498 (1959); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied,* 419 U.S. 1107 (1975); Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973). *See* notes 122-33 *infra* & accompanying text.

[106] *See generally* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CAL. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 CORNELL L.Q. 12 (1955).

[107] *See, e.g.,* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (requirement that public employees contribute to union's political activities unconstitutionally conditions employment on compulsory "expression," *i.e.,* contribution); Elrod v. Burns, 427 U.S. 347 (1976) (employment of nonpolicymaking state officials may not be conditioned on association with a political party); Sherbert v. Verner, 374 U.S. 398 (1963) (first amendment violated when condition on receipt of unemployment compensation conflicts with applicant's religious duties); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (second-class mailing privileges may not be conditioned on "acceptable" content of publications).

possibility of the government's achieving indirectly what it may not do directly.[108]

Speiser v. Randall[109] is a classic example of the unconstitutional condition doctrine and a case crucial to the arguments of such plaintiffs as BMR, Inc. In *Speiser,* the Court invalidated a California state tax program that conditioned eligibility for property tax exemption upon the taxpayer's willingness to sign a loyalty oath.[110] In addition to having certain procedural vices,[111] the exemption requirement violated the first amendment by exacting the promise to refrain from arguably protected speech in return for a financial benefit.[112] The Court found that "the appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." [113]

Some recent cases recast the unconstitutional condition theme in an equal protection mode. This analysis has led to invalidation of programs that grant privileges to one class of applicants but deny them to another group whose exercise of a constitutional right is the only feature distinguishing them from successful applicants.[114] Such distinctions in the distribution of substantial privileges discriminate against or "penalize" constitutional rights. *Shapiro v. Thompson*[115] exemplifies this line of argument. There, the Supreme Court struck down state statutes that denied welfare assistance to families unable to meet the requirement of one year's

[108] *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (finding that one-year residency requirement for welfare was unconstitutional burden on right of interstate travel even in the absence of a showing that any welfare recipient had actually been deterred from travelling).

[109] 357 U.S. 513 (1958).

[110] *Id.* 518-19.

[111] The California Supreme Court had limited the condition by construing the loyalty oath narrowly so that signatories swore only to refrain from speech constitutionally punishable as criminal syndicalism. On certiorari, the United States Supreme Court rejected this attempt to make the program constitutional and found it violative of due process because the taxpayer had the burden of proving noncriminal speech in the event that the authorities denied his application for exemption. Such a procedural burden favoring the government was invalidated because it had the potential of penalizing or deterring legitimate speech. *Id.* 526.

[112] *Id.* 518-19.

[113] *Id.* 518.

[114] *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (one-year residence requirement for eligibility for county-funded medical care creates "invidious classification" that penalizes right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residence requirement for participation in state elections discriminates against recent immigrants). *But see* Maher v. Roe, 432 U.S. 464 (1977) (state refusal to provide Medicaid funds for nontherapeutic abortions—although it did pay for expenses incident to childbirth—not unconstitutional penalty on women's right to abortion because it does not remove the means of obtaining abortions through private funds).

[115] 394 U.S. 618 (1969).

residence within the state.[116] The waiting period created "two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction." [117] Although the Constitution provides no "right" to welfare, the Court found that denial of so necessary a benefit "penalized" the free exercise of the constitutional right to travel.[118]

These cases suggest the broad outlines of constitutional arguments suitable to BMR, Inc.'s situation: (1) that the IRS unconstitutionally conditions tax-exempt status on an applicant's conformity with content standards contained in the "full and fair exposition" test; [119] and (2) that invidious discrimination results from government support of noncontroversial publications at the expense of more radical ones and from the latitude given individual prejudice in making exemption decisions.[120] The question remains whether these arguments would be successful. The following discussion considers, first, the case law that suggests that constitutional problems are not raised by denial of tax benefits and, second, the contrary argument that legal and practical considerations favor strict judicial scrutiny of the Treasury regulation's "educational" standard.

2. The Antilobbying Tax Provisions

Speiser v. Randall had appeared to establish that tax-exempt status may provide the basis for a constitutional claim.[121] Less than a year after *Speiser,* however, the Court decided *Cammarano v. United States* [122] and severely undercut its earlier broad holding. In *Cammarano,* plaintiffs challenged interpretations of the then-current Treasury regulations, which prohibited deduction as "ordinary and necessary business expenses" of expenditures in connection

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[116] *Id.* 622.

[117] *Id.* 627.

[118] *Id.* 634.

[119] *See* Brief of Appellant, *supra* note 3, at 31-39.

[120] *Cf. id.* 43-44 (problems of discriminatory application discussed in context of vagueness argument). For discussion of potential of discriminatory application of the various elements of Treas. Reg. § 1.501(c)(3) (1959), see notes 47-101 *supra* & accompanying text.

[121] 357 U.S. 513 (1958). *Cf.* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (second-class mailing privilege as basis for constitutional concern); Grosjean v. American Press Co., 297 U.S. 233 (1936) (tax on newspapers' advertising revenues is unconstitutional attempt to limit circulation).

[122] 358 U.S. 498 (1959).

with attempts to influence pending legislation.[123] The Court upheld these antilobbying decisions and curtly dismissed an argument that such provisions unconstitutionally penalized legislatively oriented speech: "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets . . . ." [124] The exemption program invalidated in *Speiser* was distinguished as an attempt to suppress " 'dangerous ideas,' " while the antilobbying provisions were "[n]ondiscriminatory" [125]—that is, applied alike to all forms of speech identifiable as lobbying without regard to the content of the views expressed.

Since *Cammarano,* lower federal courts have adopted automatically its approval of antilobbying tax provisions and have ignored or distinguished *Speiser.*[126] Even more disturbing than this rigid reading of *Cammarano*'s first amendment holding is the use of that ruling to limit equal protection scutiny in the field of taxation. In the most recent instance, *Taxation with Representation of Washington v. Blumenthal,*[127] the District Court for the District of Columbia refused to reconsider the validity of *Cammarano* in the face of changes in the tax law that permit lobbying by some exempt groups—for example, veterans,[128] fraternal soci-

[123] *See id.* 499. I.R.C. § 162(e) was amended in 1962 to allow business deductions for some lobbying; deductions are still not permitted for grass roots or political campaign activities.

Compare the antilobbying provisions of current I.R.C. § 501(c)(3) as implemented by Treas. Reg. § 1.501(c)(3)-1(c)(3) (1959) (prohibiting exemption of "action" organizations that attempt to influence legislative activities). *See* notes 8-10 *supra* & accompanying text.

[124] Cammarano v. United States, 358 U.S. 498, 513 (1959).

[125] *Id.*

[126] *See* Haswell v. United States, 500 F.2d 1133, 1148 (Ct. Cl. 1974), *cert. denied,* 419 U.S. 1107 (1975) (upholding I.R.C. § 170(c)(2), which denies deduction for contributions to group doing substantial lobbying; *Cammarano* cited for holding that such denial does not encroach upon first amendment rights); Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973) (revocation of I.R.C. § 501(c)(3) exemption of religious organization that engaged in substantial political lobbying upheld on the ground that free speech not restrained because exemption is right, not privilege).

These cases are notable for a seeming reluctance to rest wholly on the simple finding that antilobbying provisions do not infringe free speech. In *Haswell,* the court held that discrimination between lobbying and nonlobbying groups was justified also by a compelling state interest in ensuring that governmental support is not used to sponsor legislative change. 500 F.2d at 1150. The *Christian Echoes* court met the charge that revocation of plaintiff's exemption violated the free exercise clause of the first amendment with the response that the first amendment *compelled* denial of support for religious groups' political activities in order to maintain separation of church and state. 470 F.2d at 856-57.

[127] 79-1 U.S. Tax Cas. ¶ 9185 (D.D.C. 1979).

[128] I.R.C. § 501(c)(19).

eties,[129] and chambers of commerce [130]—but continue to prohibit lobbying by exempt charitable organizations.[131] The court found that *Speiser*'s denunciation of discrimination was strictly limited to programs " 'aimed at the suppression of dangerous ideas' " [132] and had no application to discrimination among different groups undertaking the same kind of expression.[133]

There has been considerable criticism of the courts' rigid treatment of *Cammarano* and challenges to antilobbying provisions.[134] Even assuming the correctness of this line of cases, sound legal and practical reasons counsel against following the *Big Mama Rag* court's adoption of their analysis in educational exemption cases. First, *Speiser v. Randall* is still good precedent for striking down standards, like the "full and fair exposition" test, with discriminatory potential. Second, the importance of the exemption to marginal political groups makes IRS discretion a weapon whose power should be subject to constitutional control through strict judicial scrutiny.[135]

Loyalty oath cases were peculiar to the McCarthy era, and undeniably the *Speiser* Court of 1958 was particularly concerned with laws aimed at muzzling suspected subversives. The cases described above go too far, however, in limiting *Speiser* to the Cold War context. Nothing in the Supreme Court's opinion restricts its application to "dangerous ideas." That language is used,[136] but it is part of a broad-based discussion of the impermissibility of

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[129] I.R.C. § 501(c)(8).

[130] I.R.C. § 501(c)(6).

[131] Taxation with Representation of Washington v. Blumenthal, 79-1 U.S. Tax Cas. ¶ 9185, at 86,301 (D.D.C. 1979).

[132] *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)).

[133] Taxation with Representation of Washington v. Blumenthal, 79-1 U.S. Tax Cas. ¶ 9185, at 86,301 (D.D.C. 1979). Having rejected the argument that *Speiser* prohibited discrimination among such groups, the court went on to hold that a simple equal protection argument, shorn of support from *Speiser*, could not evoke strict judicial scrutiny because, under *Cammarano*, no fundamental right was affected by denial of tax-exempt status. *Id.* 86,301-02. *Accord*, Taxation with Representation v. United States, 585 F.2d 1219 (4th Cir. 1978) (denying similar claims presented by organization related to Taxation with Representation of Washington).

[134] *See, e.g.*, Taxation with Representation v. United States, 585 F.2d 1219, 1224-25 (4th Cir. 1978) (Winter, J., concurring & dissenting); Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960); Rainey & Henshaw, *supra* note 4, at 230; Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114 (1970); Note, *The Sierra Club, Political Activity, and Tax Exempt Charitable Status*, 55 GEO. L.J. 1128 (1967).

[135] *See* notes 148-59 *infra* & accompanying text.

[136] Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

speech regulations that fail to provide "sensitive tools" for the protection of legitimate expression.[137]

Even as limited by the antilobbying cases, *Speiser*—and not *Cammarano*—is the precedent relevant to an examination of the Treasury Department's educational standard. Narrowly read, *Cammarano* holds only that government may constitutionally distribute tax benefits on the basis of an ideologically neutral assessment of the form of expression undertaken by a taxpayer. *Speiser,* meanwhile, protects against impermissible distinctions among taxpayers on the basis of the content of their expression. Although the Treasury regulation challenged by BMR, Inc. does not itself single out any particular ideology for differential treatment, it leaves to individual officials the discretion to do precisely that. The regulation is thus exactly the kind of blunt instrument the *Speiser* Court deplored. Its inadequacy in guiding and controlling IRS decisionmaking was explored in earlier sections of this Comment.[138] Of special relevance here are uses of the regulation clearly intended to suppress "dangerous ideas." BMR, Inc. experienced one such attempt when officials suggested that the organization modify its support of homosexuals to conform with IRS "unwritten policy." [139]

Further indication that the IRS may be led to ideological discrimination appears in *National Alliance v. United States,*[140] a recently filed challenge to the "full and fair exposition" standard. The plaintiff in that case is a nonprofit Virginia corporation that publishes the newspaper *Attack!* and distributes other material to promote Americans' "pride in their racial and cultural heritage." [141] National Alliance holds white-supremacist and anti-Semitic views [142] that place it in a position roughly equivalent to that of the 1950s Communist: it is the target of general loathing. Not surprisingly, the organization was denied tax-exempt status under section 501(c)(3) for failure to substantiate the viewpoint it "advocates" by

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[137] *Id.* 525.

[138] *See* notes 47-101 *supra* & accompanying text.

[139] *See* Brief of Appellant, *supra* note 3, at 10. *See* text accompanying note 23 *supra.*

[140] No. 79-1885 (D.D.C., filed July 19, 1979).

[141] Complaint for Declaratory Judgment and Injunctive Relief, exhibit A, National Alliance v. United States, No. 79-1885 (D.D.C., filed July 19, 1979) (Articles of Incorporation of National Alliance) [hereinafter cited as National Alliance Complaint].

[142] One issue of a National Alliance publication described its sentiments thus: "(1) Non-White immigration must be halted and all non-Whites already present in White countries must be removed, peaceably or otherwise; (2) the Jew must go, totally and unconditionally." National Alliance Bulletin, Sept., 1977, *quoted in* National Alliance Complaint, *supra* note 141, at exhibit B, at 6 (letter of Mar. 31, 1978, from IRS District Director to National Alliance denying exemption).

"a sufficiently full and fair exposition of the pertinent facts." [143] The IRS District Director's letter of denial contains a lengthy and careful analysis of the applicant's publications. Nevertheless, certain slips indicate that the substance of plaintiff's views influenced the decision. For example, among the reasons listed for denial is the following: "Whereas the regulations Section 1.501(c)(3)-1(d)(2) specifically defines the term 'charitable' as including the elimination of prejudice and discrimination and the defending of human and civil rights secured by law, your publications advocate a contrary policy." [144]

It is, of course, unlikely that every IRS official envisions a menacing image of subversion as he reviews section 501(c)(3) applications. Yet instances of ideological discrimination occur.[145] The source of such problems is the educational standard itself, which calls for more searching and subjective judgments than did the antilobbying provisions upheld in *Cammarano*. The question whether an organization has spoken publicly on a subject of legislative activity will usually have a clear answer; [146] the same is not true of the evaluation demanded by a standard that asks whether the views expressed are "beneficial to the community" and substantiated by "full and fair exposition of the pertinent facts." [147] The discriminatory potential of such a standard, as well as the examples of actual abuse, demonstrates the need for the vigilant protection offered in *Speiser v. Randall*.

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[143] National Alliance Complaint, *supra* note 141, at exhibit B, at 8 (letter of District Director).

[144] *Id.* This Comment does not intend to advocate tax-exempt status for National Alliance. That case may contain issues beyond those strictly related to freedom of expression. For example, National Alliance has a racially exclusionary membership policy that could bring it within the prohibition of McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (tax exemption of fraternal society with racially discriminatory membership policy is state action violative of fifth amendment). For further discussion of denial of exempt status to racially discriminatory organizations, see notes 153-54 & 157 *infra* accompanying text. It should be noted, however, that the District Director's denial letter appears far more concerned with National Alliance's publications than with its practices.

[145] For example, the IRS threatened to revoke the exemption of the Fellowship of Reconciliation, a world pacifist organization, on the ground that the Fellowship had abrogated the lobbying prohibition. The organization was permitted to keep its exemption only after protest from Congress and the press. *See* Caplin & Timbie, *Legislative Activities of Public Charities*, LAW & CONTEMP. PROBS., Autumn, 1975, at 183, 187 (issue devoted to federal taxation and charitable organizations). A comparable situation was described in Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863 (D.D.C. 1973), in which some evidence indicated that the Center's exemption had been denied under pressure from the Nixon White House. *Id.* 867. *See also* N.Y. Times, Feb. 22, 1976, § 4, at 4, col. 3.

[146] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959) (defining attempts to influence legislation).

[147] *Id.* § 1.501(c)(3)-1(d)(3)(b).

3. Tax-Exempt Status and the Survival of an Organization

The foregoing discussion does not suggest that every system of government-granted benefits raises problems of constitutional dimension. Tax-exempt status under section 501(c)(3), however, is not a benefit of marginal importance; it may be a crucial factor in the survival of a nonprofit organization. In addition to removing the obligation to pay federal income taxes, an exemption allows qualified organizations to receive tax-deductible contributions.[148] Section 501(c)(3) status also facilitates receipt of grants from private foundations.[149] Indeed, these sources of income may be more critical to an exempt organization's survival than its relief from taxation.[150] In 1975, for example, charitable contributions and private grants constituted over fifty percent of Big Mama Rag's income.[151] National Alliance, too, claims to be dependent upon private charity.[152]

The government itself recognizes that denial or revocation of tax-exempt status may be a powerful inducement to conform to a particular pattern of behavior. Consequently, tax exemption has been used as a tool to further policy goals. This method of policy implementation was approved in several cases, which upheld, for example, denial of exempt status to racially segregated schools[153] and to a fraternal order with a racially discriminatory member-

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[148] *See* I.R.C. § 170(c)(2) (permitting deduction of contributions only to organizations that qualify under § 501(c)(3)).

[149] *See* I.R.C. § 4945(d)(5) (foundation's expenditures for purposes consonant with § 501(c)(3) not "taxable expenditures").

[150] *See* B. HOPKINS, *supra* note 78, at 23; Sanden, *What to Do About the Loss of Exemption: Effect Upon the Organization and Its Members*, 24 N.Y.U. INST. ON FED. TAX. 167 (1966). *See also* Alexander v. "Americans United" Inc., 416 U.S. 752, 766 (1973) (Blackmun, J., dissenting).

[151] *See* Brief of Appellant, *supra* note 3, at 7.

[152] *See* National Alliance Complaint, *supra* note 141, at 5-6.

The importance of tax-exempt status to organizations is underscored by the notion of tax expenditures. One leading critic of the tax-exemption system, for example, has compared tax exemptions to direct government expenditures. *See* Surrey, *supra* note 99, at 713-15. Tax exemptions resemble expenditures in creating revenue losses and in providing significant federal support through relief from tax burdens. *See* Congressional Budget and Impoundment Control Act of 1974, § (3)(a)(3), 31 U.S.C. § 1302(a)(3) (1976) (defining tax expenditures as revenue losses). This concept has gained wide acceptance; in fact, Congress has published an analysis of tax expenditures in addition to the ordinary direct appropriations budget. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1976, at 101, 108-09 (1975).

[153] Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

ship policy.[154] Implicit in these decisions is the assumption that tax exemptions constitute significant governmental support for an organization.[155] Were this belief incorrect, the coercive use of revocation or denial of exemptions would be a futile exercise. One cannot implement public policy by withholding that which could be dispensed with. Thus, the IRS, in determining exempt status, does more than dole out federal largesse. It administers a financial incentive that may be crucial enough to alter an organization's nature if the organization would rather change and survive than be principled and defunct.[156]

The coercive use of tax policy is acceptable if its ultimate aim is elimination of racial segregation. It is generally recognized that the government may wield powerful tools in furtherance of that goal.[157] A tax provision whose administration is so ill-regulated that it permits the coercive weapon to be used against an organization because it is "doctrinaire" may not be justified on equally clear policy grounds.

The nature of the organizations whose survival may be thrown into doubt heightens the need for careful scrutiny of the Treasury regulations. The groups likely to run afoul of the "full and fair" standard are not those representing mainstream ideology.[158] Rather, they are those, like BMR, Inc. and National Alliance, that espouse unpopular or radical analyses of American society. And it is precisely these perspectives that most need first amendment protection, for they encounter the greatest intolerance.[159]

B. *The Void-for-Vagueness Analysis*

The legal and practical background discussed above identify the Treasury Department's educational exemption standard as an

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[154] McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (exemption under I.R.C. §§ 501(c)(7) & 501(c)(8) for nonprofit clubs and fraternal orders).

[155] *Id.* 456-57.

[156] *See* Clark, *supra* note 134, at 450 (describing charitable organizations' reactions to "crackdown" by IRS on charitable exemptions).

[157] *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966); Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378 (1979).

[158] For indications of the IRS's tendency to screen more leniently the exemption applications of noncontroversial organizations, see discussion of the "advocacy" standard of Treas. Reg. § 1.501(c)(3)-1(d)(3)(b) (1959) at notes 54-63 *supra* & accompanying text.

[159] *See, e.g.*, Young v. American Mini Theaters, 427 U.S. 50, 63-64 (1976); Roth v. United States, 354 U.S. 476, 484 (1957); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

apt candidate for strict constitutional scrutiny. The regulation has a substantial capacity for and a recent history of ideologically discriminatory abuse. Moreover, tax-exempt status is important enough to nonprofit organizations that its denial may endanger their capacity to advance their viewpoints. This threat seems more than sufficient to trigger the arsenal of first amendment jurisprudence.

Both BMR, Inc.[160] and National Alliance[161] have advanced various theories to support judicial invalidation of the regulation's educational standard. This Comment will proceed to examine one such theory: that the standard is void for vagueness.[162] A finding of constitutional inadequacy in statutory language may compel invalidation of that provision.[163] As a means of attacking a pervasive evil, therefore, a vagueness challenge is preferable to the kind of individual claim that might be resolved simply by ordering relief for that plaintiff. Furthermore, because the vagueness doctrine aims at precisely those statutory and administrative defects that mar the educational exemption regulation, it provides the most comprehensive and telling analysis of that regulation's constitutionality.

The void-for-vagueness doctrine has been used to invalidate criminal statutes and administrative regulations;[164] it is regarded as particularly appropriate in cases in which first amendment rights may be at risk.[165] Among the noncriminal provisions struck down

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[160] *See* Brief of Appellant, *supra* note 3, at 31 (summarizing unconstitutional condition, equal protection, and vagueness arguments).

[161] National Alliance Complaint, *supra* note 141, at 4-5 (outlining arguments regarding penalty on first amendment, unconstitutional condition, vagueness, and equal protection).

[162] BMR, Inc. argued vagueness in the district court. Judge Sirica dismissed the issue with the conclusory remark that "[t]his standard is certainly capable of objective application—it does not ask the IRS to determine whether the views expressed are worthy or correct. Instead, it asks only whether the facts underlying the conclusions are stated." Big Mama Rag, Inc. v. United States, 79-1 U.S. Tax Cas. ¶ 9362, at 86,873 (D.D.C. Apr. 30, 1979), *appeal docketed*, No. 79-1826 (D.C. Cir. Aug. 1, 1979).

[163] *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

[164] *See* Laird v. Tatum, 408 U.S. 1, 11 (1972) (dictum); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (second-class mailing privileges may not be conditioned on content of publication); Jacobs v. Board of School Comm'rs, 349 F. Supp. 604 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1974) (overturning on vagueness and overbreadth grounds public school publication regulations enforced by suspension and expulsion); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968) ("misconduct" too vague a basis for expulsion or suspension from university). *But see* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) (school regulations not subject to stringent standards of precision).

[165] *See* Smith v. California, 361 U.S. 147, 151 (1959) (stricter standards of precision required for speech-related statutes); Note, *The Void-for-Vagueness*

on this theory are several that permitted ideological discrimination by means of threats to withhold important government benefits.[166] One example comes from the related area of nonprofit corporation charters. The corporate charter, like the tax exemption, confers a type of public status essential to the survival and operation of an organization.[167] In *Association for the Preservation of Freedom of Choice v. Shapiro*,[168] plaintiffs challenged denials of nonprofit corporation charters. Under the state statute, judicial approval was required before a charter could be granted.[169] A lower court judge, in denying the applications, held that he had the responsibility to determine whether the proposed corporation would be "in accord with public policy and not injurious to the community." [170] The New York Court of Appeals reversed because the tests enunciated were "too vague, indefinite and elusive to serve as an objective judicial standard. Within such a scope the individual Justice would be at liberty to indulge in his own personal predilections . . . ." [171] This case illustrates the appropriateness of the vagueness theory in cases like *Big Mama Rag*.

The question of vagueness arises if application of a law requires too much guesswork on the part of enforcing authorities or persons subject to them. Uncertainty may result from statutory language that is amenable to subjective interpretation.[172] It may also stem from the presence of conflicting elements in the law itself.[173] Either failing may engender two effects subversive of free expression. The

Doctrine in the Supreme Court, 109 U. PA. L. REV. 60, 94 (1960) [hereinafter cited as *Vagueness Doctrine*]. The Note focuses on criminal statutes but suggests that in "noncriminal proceedings, . . . the seriousness of what is at stake . . . will be an extremely significant variable . . . in the determination of whether a statute will survive a vagueness attack." *Id.* 70 n.16.

[166] Keyishian v. Board of Regents, 385 U.S. 589 (1967) (state employment withheld for "treasonable or seditious" utterance); Baggett v. Bullitt, 377 U.S. 360 (1964) (vague loyalty oath required for state employment).

[167] *See* Wilson & Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979); 6 U. TOL. L. REV. 237 (1974).

[168] 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961).

[169] *Id.* at 381, 174 N.E.2d at 489, 214 N.Y.S.2d at 390.

[170] *Id.* at 380, 174 N.E.2d at 488, 214 N.Y.S.2d at 931.

[171] *Id.* at 382, 174 N.E.2d at 489, 214 N.Y.S.2d at 391. Although the court thus suggests that first amendment values are implicated by denial of charters, it does not appear to regard its vagueness analysis as constitutionally based.

This decision was cited with approval in Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973).

[172] *See, e.g.*, Hynes v. Borough of Oradell, 425 U.S. 610 (1976) ("recognized . . . cause"); Smith v. Goguen, 415 U.S. 566 (1974) ("contemptuously"); Keyishian v. Board of Regents, 385 U.S. 589 (1967) ("treasonable or seditious"); Schneider v. State, 308 U.S. 147 (1939) ("good character").

[173] *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (related civil and criminal statutes with conflicting definitions of "treasonable or seditious").

first is the possibility of abuse of discretion by government officials which, because of the murkiness of the standard, may go unchecked.[174] The second is a "chilling effect"—would-be speakers may forego constitutionally protected activities rather than risk the penalty attendant upon unwitting violation of the vague legal requirement.[175]

The abuse-of-discretion problem is illustrated by *Smith v. Goguen*.[176] At issue before the Supreme Court was a Massachusetts statute providing criminal penalties for one who "treats contemptuously" the American flag. A youth arrested under the statute successfully raised the habeas corpus plea that the language was unconstitutionally vague. During oral argument, the attorney for the arresting sheriff admitted that if a war protestor had draped himself in a flag for protection against a rainstorm, he would have been arrested for contemptuous misuse, while an American Legionnaire doing the same thing would have remained unmolested.[177]

Keyishian v. Board of Regents[178] explains the second danger—the chilling effect. Under the statute invalidated there, a state school employee could be dismissed for "treasonable or seditious" utterances. The Supreme Court found that this standard had the effect of inhibiting even academic consideration of radical political doctrine; the line dividing protected discussion from punishable incitement was far too ill-articulated to allow an instructor to teach politics without fearing for his job.[179]

The Treasury Department's definition of exempt educational activity suffers from both of these defects and therefore fosters both of the dangers outlined above. The operative language of the educational tests has been shown to be so broad and value-laden that it not only permits, but encourages, subjective evaluation. The reviewing IRS agent is instructed to judge the value ("useful and

[174] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[175] *See* Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); *Vagueness Doctrine, supra* note 165, at 80. *See generally* Laird v. Tatum, 408 U.S. 1, 11 (1972) (chilling effect may be a constitutional violation when "the challenged exercise of governmental power was regulatory, proscriptive or compulsory in nature").

[176] 415 U.S. 566 (1974).

[177] *Id.* 575-76. *See also* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (vague parade permit ordinance used discriminatorily against civil-rights demonstrators); Niemotko v. Maryland, 340 U.S. 268 (1951) (clear pattern of discriminatory abuse in issuance of park permits).

[178] 385 U.S. 589 (1967).

[179] *Id.* 601-02.

beneficial"),[180] the tenor ("advocates a particular position"),[181] and the documentation ("full and fair") [182] of educational publications. Vagueness also arises from the existence of two different standards governing the level of advocacy permissible for exempt institutions. The tax examiner's decision to apply the educational standard rather than the charitable test is unguided by the regulation and is essentially a matter of personal experience and discretion.[183]

With such a foundation of imprecise language and internal inconsistency, the instances of administrative abuse already discussed [184] should come as no surprise. Even absent malicious intent to misuse his power, the IRS official may make inequitable decisions because he has no guidance for fair determination. The regulation's language may serve as the source of a chilling effect as well. Like the instructors in *Keyishian,* organizations in need of tax-exempt status may feel forced to tailor publications to satisfy the IRS.[185] If their editors perceive—correctly—that the IRS regards statistics or "hard facts" as evidence of educational value,[186] they may, for fear of losing exempt status, adopt a form of discussion inappropriate to their concerns.

This analysis requires the conclusion that Treasury regulation section 1.501(c)(3)-1(d)(3)(b) is void for vagueness. That result does not, however, leave the exemption field without boundaries. The present regulation furnishes a solution that can provide the IRS agent with more precise guidelines and offer the applicant a less restrictive examination of its publications. That solution is the subject of the following part.

IV. A Proposed Solution

The concern of first amendment inquiry is to allow the freest possible expression, without impairment of countervailing interests. When first amendment values are at stake, it has long been held that regulations tending to restrict them must be worded carefully in order to allow expression "breathing space to survive." [187] Financial

180 *See* notes 47-53 *supra* & accompanying text.

181 *See* notes 54-63 *supra* & accompanying text.

182 *See* notes 64-73 *supra* & accompanying text.

183 *See* notes 74-101 *supra* & accompanying text.

184 *See* note 145 *supra.*

185 *See* note 156 *supra* & accompanying text.

186 *See* notes 65-66 *supra* & accompanying text.

187 Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963)).

security through tax-exempt status is a significant determinant of a nonprofit organization's "breathing space." The Treasury regulation governing decisions about tax exemptions should therefore be drafted to provide the least possible opportunity for arbitrary assessment of the content of an organization's views.

The least intrusive means of regulating tax exemptions of educational organizations has already been provided by the IRS. It is the relatively content-free standard of Treasury regulation section 1.501(c)(3)-1(d)(2), "Charitable defined." Under this standard, an IRS official need only determine whether an organization has engaged in lobbying and campaign activities and whether its business practices meet the organizational and operational tests of section 1.501(c)(3)-1(a) to (c). These tests are capable of much more objective application and are more closely related to the revenue collection function and expertise of the IRS than is a test of educational content.[188]

Elimination of the "full and fair" standard might be problematic if the categories of educational and charitable organizations were completely distinct. Fortunately, however, they are not. Treating education as a subset of charity would not depart from accepted legal doctrine nor from the language of the Treasury regulation.[189]

Moreover, it is unlikely that any significant countervailing interests would be abridged by denying the IRS the authority to evaluate educational content. Even assuming that the present regulation is based upon some legitimate government interest in regulating the content of educational organizations receiving its imprimatur, this Comment has suggested that the safeguarding of that interest should not be left to the ad hoc decisionmaking of IRS officials. And the assumption of the existence of some legitimate governmental interest is of questionable validity. In fact, judicial decisions that have upheld denials of tax exemptions have not had to address disputed IRS judgments of the content of publications.[190] This case law has even led two commentators to assert, erroneously, that content is irrelevant to decisions on applications for educational exemptions.[191] Courts have denied exemptions on the basis

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188 *See* notes 72-73 & 99 *supra* & accompanying text.

189 *See* notes 83-92 *supra* & accompanying text.

190 *Cf.* Cammarano v. United States, 358 U.S. 498 (1959) (no dispute regarding nature of the speech in which plaintiff had engaged).

191 Rainey & Henshaw, *supra* note 4, at 215.

of an applicant organization's lobbying activities [192] or its failure to meet the exclusivity provision of the organizational and operational tests [193] and, occasionally, on the special policy ground that racist activities may not be furthered with federal support.[194] These tests would still be available, even without the educational standard, to protect whatever interests were upheld in those cases.[195] The existence of the educational standard creates an unnecessary additional restriction—one almost never used except in cases, like *Big Mama Rag* and *National Alliance,* that raise questions of discrimination.

Retention of the "full and fair" standard is not justified by fiscal considerations either. It is doubtful that the increase in exemptions resulting from relaxation of the standard of review would have a severe, if even a noticeable, effect on the public fisc. The reform suggested here would not substantially increase the number of exemptions: the majority of educational organizations, such as schools and libraries, are clearly within the definition of "educational" and thus exempt under the present restrictive standard. The organizations that would benefit from a more liberal definition would be the small and unorthodox ones, such as Big Mama Rag.

The charitable exemption already accounts for a revenue loss of approximately two billion dollars,[196] the educational exemption, one of only approximately one hundred and seventy million.[197] Any additional revenue cost would result from loss of direct tax

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[192] Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974); Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir. 1972); League of Women Voters v. United States, 180 F. Supp. 379 (Ct. Cl. 1960); *cf.* Cammarano v. United States, 358 U.S. 498 (1959) (lobbying expenses not "ordinary and necessary" business expense under I.R.C. § 23(a)(1)(A)).

[193] American Inst. for Econ. Research v. United States, 302 F.2d 934 (Ct. Cl. 1962); Fides Publishers Ass'n v. United States, 263 F. Supp. 924 (N.D. Ind. 1967).

[194] Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[195] Indeed, several commentators have suggested that the "full and fair" language should be read in the context of the lobbying prohibition. That is, the standard may have been promulgated initially as a means of determining whether organizations were attempting to influence legislation. *See* B. HOPKINS, *supra* note 78, at 131; P. TREUSCH & N. SUGARMAN, *supra* note 94, at 106; Jordan, *supra* note 100, at 14; *see also* Haswell v. United States, 500 F.2d 1133, 1143-44 (Ct. Cl. 1974). The test for the breach of that provision should be objective, relying, for example, on the existence of contacts with legislators or contributions to political campaigns. For discussion of cases involving antilobbying provisions, see notes 122-33 *supra* & accompanying text.

[196] *See* Surrey, *supra* note 99, at 709.

[197] *Id.*

revenue from the organization or loss of personal income tax due to charitable deductions. The first would most likely be minimal—these organizations are nonprofit and therefore, by current accounting definitions, have no taxable income.[198] The second loss is impossible to estimate. Would-be contributors to these unorthodox organizations probably do not at present account for a major concentration of tax revenue. This seemingly negligible effect on tax revenues should not be allowed to weigh heavily against the interest of assuring the least intrusive means of regulating expression.[199]

This Comment has examined—and found wanting—one element of the tax-exemption machinery. The broad language and double standards of the charitable/educational regulations engender, at best, confusion and, at worst, discrimination against controversial publications like *Big Mama Rag*. First amendment vagueness theory may be employed to analyze and extirpate the offending language. Without a change such as that recommended here, the "full and fair" regulation remains a source of the fear cogently articulated by Mr. Justice Blackmun:

> [W]here the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time . . . , but application of our tax laws should not operate in so fickle a fashion.[200]

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198 *See* Bittker & Rahdert, *supra* note 78, at 307-28.

199 *Cf.* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (state interest in public tax revenue insufficient to justify suspension of welfare funds without prior hearing); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (state interest in limiting welfare expenditures insufficient to justify durational residency requirement for welfare eligibility, which restricts right to travel).

Any loss in tax revenues might be partially offset by a savings in administrative costs because the suggested reform, by avoiding thorny definitional questions and scrutiny of content, would probably be more easily implemented.

200 Alexander v. "Americans United" Inc., 416 U.S. 752, 774-75 (1974) (Blackmun, J., dissenting).